Supreme Court of the United States

OCTOBER TERM, 1942.

No. 947

GERD H. HENJES,

Petitioner,

—against—

AETNA INSURANCE COMPANY, ATLANTIC MUTUAL INSURANCE COMPANY, BRITISH & FOREIGN MARINE INSURANCE COMPANY, LIMITED, COMMERCIAL UNION ASSURANCE COMPANY LIMITED OF LONDON, ENGLAND, FEDERAL INSURANCE COMPANY, HARTFORD FIRE INSURANCE COMPANY, INSURANCE COMPANY OF NORTH AMERICA, NORTH BRITISH & MERCANTILE INSURANCE COMPANY, LIMITED, ROYAL INSURANCE COMPANY, LIMITED, STANDARD MARINE INSURANCE COMPANY, LIMITED, THE AUTOMOBILE INSURANCE COMPANY OF HARTFORD, CONN., THE CONNECTICUT FIRE INSURANCE COMPANY, THE CONTINENTAL INSURANCE COMPANY, THE HOME INSURANCE COMPANY, UNIVERSAL INSURANCE COMPANY and WESTCHESTER FIRE INSURANCE COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

MORRIS EHRLICH,
Counsel for Petitioner.

ROBERT F. DONOGHUE,
BENJAMIN LEWIS,
Of Counsel.

THE COURT PRESS, N. Y. C.

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Respondents.

Petition for Writ of Certiorari.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Gerd H. Henjes, the petitioner above named, respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, affirming a judgment of the United States District Court for the Eastern District of New York in favor of the respondents, entered upon a verdict directed in their favor by the Trial Court.

Jurisdiction.

The decision of the Circuit Court of Appeals was filed on January 4th, 1943. A petition for a re-hearing was filed on January 19th, 1943, and denied on January 23rd, 1943. The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. Section 347).

Statement of Facts.

This action was originally brought against the respondents, on a policy of marine insurance, in the Supreme Court, County of Kings, New York. It was thereafter duly removed to the District Court for the Eastern District of New York and there tried before a jury. At the close of the entire case the Court directed a verdict for the respondents on the ground that the breach by the petitioner of a promissory warranty in the policy had been proved and was a complete defense to the suit (R., pp. 72-74).

In March, 1940, in consideration of a premium of $6300, respondents issued a valued, time marine insurance policy to the petitioner, covering for one year his vessels named in an attached schedule against the perils mentioned which included perils of the sea (R., p. 75; Exh. 1). During the next month the coverage of the policy was extended, by endorsement, for an additional premium, to include damage to the petitioner up to the limit, and for the time, stated for the loss, destruction or injury to his tugboat "Edwin Duke" from the perils covered by the original policy. The "Duke" was valued at $30,000 (R., p. 75).

Respondents' policy contained a promissory warranty which applied to the "Duke" that confined her use and

navigation to New York Harbor and nearby waters named, but "* * * with privilege to operate in Great South Bay via Fire Island Inlet, including operation in the Inlet, subject to obtaining fair weather reports prior to clearing New York Harbor and warranted not in excess of one vessel in tow; * * *" (R., p. 75).

During the policy period the "Duke" sank under circumstances hereafter related and became a total loss. Petitioner duly filed proof of claim; respondents refused to recognize any liability under their policy, and this suit was instituted with the result noted.

The "Duke" was a steel tugboat sixty-nine feet long, having two hundred horsepower from a Diesel engine. Her loss occurred in the following manner:

After getting the required fair weather report the tug left New York Harbor on the evening of December 3rd, 1940, with one barge loaded with rock in tow for Fire Island Inlet. After passing the fairway buoy off Rockaway Point she became part of a tow made up of the five hundred horsepower tug "Gerd Henjes", also owned by petitioner, which had been towing two rock laden barges and petitioner's two hundred and forty horsepower tug "Helen Barbara" which had been towing another barge also loaded with rock.

This combined tow, with the "Henjes" in the lead followed in tandem by her barges, the "Duke" with its barge, and the "Barbara" with its barge, proceeded without trouble to Fire Island Inlet where the barges were left. About a quarter past one in the afternoon of the next day, December 4, 1940, the three tugs left the Inlet bound west for the Coney Island seawall. They then were in a tow made up in tandem, in charge of the "Henjes'" captain, which consisted of the "Duke" in the lead with a hawser to the tow of the "Barbara" that had in turn a hawser from her stern to the bow of the "Gerd

Henjes" which had four empty barges hanging in tandem from a hawser on her stern.

When the tow left the Inlet the weather was clear and the sea calm. After it had gone westward at full speed for about three hours the weather changed. The wind came up from the southwest to reach a velocity of around thirty miles an hour about five o'clock, and the sea came up with it until by half past six the waves were running about twenty-five feet high. The flotilla kept on very slowly after this change in weather.

Between six and seven o'clock the "Henjes'" captain reported to the "Duke's" captain, by radio telephone, that his hawser to the barges had parted and directed the "Duke" to cast off and come back to help pick up the barges. The "Duke" did so but before it could help, the "Henjes" had succeeded in making fast to the barges again, and the "Duke" thereupon resumed its position at the head of the tow. The same thing occurred with the same result about half past seven.

About a quarter past eight more serious trouble occurred. The men on the barges, there being two on each barge, began flashing lights to the "Henjes," and its captain ordered the "Duke" to cast off and go back to help them. The "Duke" complied and found that the last three barges had broken away from the first and were rapidly drifting toward the shore. The "Duke's" master testified that his object in going back to the barges was to save their crews (R., pp. 21, 23).

After considerable difficulty the "Duke" succeeded in heaving a line to the first of the three barges and getting a hawser fast to its center bitt. When the "Duke" attempted to tow the barges, however, it found that it could make no headway and was pulled with them toward the shore until it touched bottom (R., pp. 24, 46). Finding it impossible under the prevailing weather conditions to

save the barges and their crews, and in order to avoid danger to the tug and its crew, the "Duke's" captain cut loose from the barges and brought the tug out into deep water (R., p. 24).

He thereupon reported to the "Henjes'" captain, by radio telephone, asking him to try to get help from the Coast Guard for the men on the barges and telling him that the "Duke" would try to make Coney Island. After cutting loose from the barges at about 8:40 P. M. (R., pp. 25, 26, 57), the tug appears to have navigated her course for about three-quarters of an hour without difficulty (R., pp. 53, 58-59), until about half past nine that night, when she sent out distress signals (R., pp. 25, 26). During this period, while the tug was running light, the severity of the storm intensified considerably (R., p. 57).

About half past nine, after the tug had suffered severely in the wind and waves, and had been well nigh swamped by the mountainous waves which swept over her (R., pp. 24-25, 58, 59), its captain saw a light about five miles out to sea, on his port hand, and sent out distress signals which were answered by signals showing that the approaching vessel was a Coast Guard boat. The Coast Guard cutter soon came up and took the captain and crew off the tug, then so low in the water that all attempts to tow her were futile. The tug thereafter sank and was a total loss. Subsequent efforts to locate the vessel proved unavailing (R., p. 31).

The Decision of the Circuit Court of Appeals.

The Court below held that the towage warranty was a promissory warranty whose breach merely suspended the insurance during the time the breach remained uncured, and that the insurance would reattach when the breach was ended. In this connection, the Court held that in

assisting in the tow of more than one vessel (on the east and westbound voyages) the "Duke" breached the towage warranty, that this breach continued even after she cast off from the flotilla to go to the rescue of the crews aboard the three barges, and did not terminate until she cut away from the barges.

At the time of the loss, the Court held, the "Duke" was not towing in violation of the warranty. Notwithstanding this circumstance, and despite the fact that the tug did not sink until approximately two hours after she had cast off from the barges and abandoned her rescue effort, the Court held that plaintiff had failed to overcome the effect of the supervening breach, and, accordingly, affirmed the judgment.

In reaching this result the Court held, as a matter of law, that the "Duke" had been mortally wounded during her rescue effort, and that such effort, as a matter of law, did not constitute an attempted salvage. Accordingly, the Court reasoned that the injury was sustained during the period of breach, and, hence, that petitioner was precluded from having a recovery for his loss. Petitioner maintains that in arriving at these conclusions the Court erred.

Presumably, had the Court found that the rescue effort constituted an attempted salvage it would have held, in accordance with the established rule applicable in such a situation, that defendants were responsible for the loss notwithstanding that it might have resulted by reason of the attempted salvage. The Court held, however, as a matter of law, that it was the "Duke's" duty to go to the assistance, as she did, of the three barges which had broken away (notwithstanding that the undisputed facts established, and the Court found, that the tug was too small for the job), and that this was a continuing duty which prevented her from being treated as an attempting salvor to avoid the warranty in the policy.

The Court held further that there was no fair question of fact to be decided by the jury as to the actual cause of the loss; being of the opinion that in touching bottom during the attempted rescue, the vessel suffered an injury which occasioned her subsequent sinking after the insurance reattached. In giving conclusive effect to this circumstance, it would appear that the Court overlooked completely other evidence in the record which established, at least to the extent of making the question one of fact for a jury, that the loss actually was caused solely by perils encountered after the "Duke" had cut loose from the barges and after the breach had terminated.

The Trial Court, it is noteworthy, held that the rescue effort did constitute an attempted salvage, and directed a verdict for respondents solely on the ground that the towage warranty had been breached by the "Duke" combining in a tandem which comprised more than one vessel (R., pp. 72-74). The Trial Court does not appear to have considered whether the loss was occasioned by injury sustained during the attempted rescue, or by circumstances occurring subsequent thereto. Sufficient evidence was presented, however, to justify a finding by a jury that the sinking resulted from injury sustained after the insurance reattached.

Principal Questions Presented.

1. Whether a towing vessel which in going to the aid of her tow renders a service that is concededly hazardous and beyond her fair capacity of performance is not thereby performing an extraordinary service, one far beyond her normal obligation to her tow, and one, therefore, which requires her to be treated as an attempting salvor, thereby avoiding a towage warranty of the character here involved.

2. Whether a towing vessel which, in response to the statutory mandate to save life in distress on the seas (46 U. S. C. A., sec. 728), undertakes to rescue the crews of her tow is not thereby rendering a salvage service, regardless of any obligation to save the tow itself.

3. Whether under the circumstances mentioned in the previous questions there is not presented, in any event, an issue of fact as to whether the rescue effort constituted an attempted salvage, which the petitioner is entitled to have determined by a jury.

4. Whether the Circuit Court of Appeals may give conclusive effect to evidence pointing to one theory of loss which negatives recovery by the assured, thereby depriving him of a jury trial, where there is abundant competent and material evidence in the record establishing a cause for the loss which would sustain a recovery by the assured.

Specifications of Error.

1. The Court below erred in holding that there was a continuing duty upon the "Edwin Duke" to go to the assistance of the barges which prevented her from being treated as an atempting salvor to avoid the towage warranty.

2. The Court below erred in failing to hold that upon the undisputed facts of this case the rescue effort constituted an attempted salvage, sufficient to avoid the towage warranty.

3. The Court below erred in failing to hold that upon the facts in this case the question whether the "Duke"

was an attempting salvor presented at least an issue of fact for the jury.

4. The Court below erred in holding that there was no fair question of fact to be decided by the jury as to the actual cause of the "Duke's" loss.

5. The Court below, in holding that there was no fair question of fact to be decided by the jury as to the actual cause of loss, erroneously gave conclusive effect to evidence claimed to sustain respondents' theory of the loss, and erroneously failed to give due weight and effect to other evidence in the case which established that the loss was caused under circumstances which justified a recovery by petitioner, or at least required submission of the entire issue to the jury.

6. The Court below erred in failing to consider the evidence in the light most favorable to the petitioner.

7. The Court below erred in holding that the Trial Court had properly directed a verdict for the respondents.

Reasons for Allowance of the Writ.

1. In holding on the facts at bar that there was a continuing duty upon the "Duke" to go to the assistance of the barges which prevented her from being treated as an attempting salvor, and that by reason of such circumstance the towage warranty was not avoided, the Court below decided a federal question, to wit, a question arising under 46 U. S. C. A., sec. 728, and an important question of marine and insurance law all in a way that seems untenable and in conflict with the decision of the Trial Court on this phase of the case, and in conflict with its prior decision in *The Jos. F. Clinton*, 250 Fed.

977, and in conflict with applicable decisions of this Court and other Circuit Courts and in conflict with the weight of authority, all as more fully appears from the cases and argument under Point I of the annexed brief.

2. In holding that there was a continuing duty upon the "Duke" which prevented her from being treated as an attempting salvor, the Court below, in effect, imposed upon the tugboat the liability and obligations of an insurer, thereby deciding an important question of marine law in conflict with the weight of authority and with the applicable decisions of this Court and other Circuit Courts, as more fully appears from the cases cited under Point I of the annexed brief.

3. The decision of the Court below imposes a new, and unduly onerous, burden upon towing vessels. It compels them, under the guise of holding that they owe a duty of assisting their tows, to render aid even though it be beyond their ability, and notwithstanding that the rendition of such aid may expose the towing vessel and its crew to great danger. It extends beyond all proper limits the heretofore accepted and sound doctrine that a towing vessel is required to make only a reasonable effort to safe its tow. It nullifies the well established principle that the rendition of an extraordinary service by a towing vessel constitutes a salvage. The decision below is so manifestly fraught with dangerous possibilities of far reaching consequence in the maritime field, and is in such sharp conflict with the weight of authority, as more fully shown under Point I of the annexed brief, that it would seem eminently desirable that this Court exercise its power of review to correct and prevent the perpetration of the error committed below.

4. In failing to hold that there was at least a question of fact for the jury as to whether, in the circum-

stances at bar, the "Edwin Duke" was an attempting salvor, the Court below has deprived petitioner of his right to a jury trial on a vital and decisive issue in the case, and has thereby so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision, as more fully appears under Point I of the annexed brief.

5. In holding that there was no fair question of fact to be decided by the jury as to the actual cause of the loss, the Court below erroneously gave conclusive effect to evidence tending to sustain respondents' theory of the loss, and erroneously failed to give due weight and effect to other evidence in the case which established a loss under circumstances entitling petitioner to a recovery, thereby improperly substituting its own judgment on issues of fact properly determinable by a jury, and thereby failing to consider the evidence in the light most favorable to the petitioner, and thus so far departing from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision, as more fully appears from the cases and argument under Point II of the annexed brief.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued to the Circuit Court of Appeals for the Second Circuit, to the end that this cause may be reviewed and determined by this Court; that the determination and decree of the Court below be reversed; and that petitioner be granted such other and further relief as may be proper.

GERD H. HENJES,
Petitioner.

By MORRIS EHRLICH,
Counsel for Petitioner.

Dated, New York, April 16, 1943.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The District Court rendered a decision which is not officially reported, but appears at pages 72 to 74 of the record.

The opinion of the Circuit Court of Appeals is reported in 132 F. (2d) 715.

Statement.

The essential facts of the case are stated in the accompanying petition; and in the interests of brevity are not repeated here. Any necessary elaboration of the facts on the points involved will be made in the course of the argument which follows.

Summary of Argument.

The points of the argument follow the reasons relied upon for the allowance of the writ of certiorari.

Argument.

POINT I.

The Court of Appeals erred in holding that there was a continuing duty upon the "Edwin Duke" which prevented her from being treated as an attempting salvor and thereby avoiding the towage warranty. In any event, the question whether the rescue effort constituted an attempted salvage presented an issue for the jury.

As noted in the annexed petition, the "Duke" went to the aid of the three drifting barges primarily in order to rescue the crews on the barges (R., pp. 21, 23). In view of the dangerous weather conditions then prevailing, it is evident that the crews on the barges were in grave danger. Under the circumstances a statutory duty was imposed upon the "Duke's" master, apart from any contractual obligation owing to the tow, to render all possible assistance to the helpless men on the drifting barges (46 U. S. C. A., sec. 728).

The mentioned statute provides that:

> "The master or person in charge of a vessel shall, so far as he can do so without serious danger to his own vessel, crew, or passengers, render assistance to every person who is found at sea in danger of being lost; and if he fails to do so, he shall, upon conviction, be liable to a penalty of not exceeding $1,000 or imprisonment for a term not exceeding two years, or both."

Apart from statutory obligation, it has long been recognized that there is an imperative duty upon every mariner to go to the assistance of those upon the seas who

are in distress and in danger of losing their lives (*The Schooner Boston*, 1 Sumner 328, 355). Accordingly, it has become an accepted principle in marine law that a departure from the usual course in response to this duty will not affect the covering insurance, or release the underwriters from their liability (*The Cuzco*, 154 Fed. 177, 178 [C. C. A. 2]; *Crocker* v. *Jackson*, 6 Fed. Cas. No. 3398, p. 829; *Williams* v. *Box of Bullion*, 29 Fed. Cas. No. 17717, p. 1359; 5 Couch on Insurance, 3731; Arnould on Marine Insurance [11th ed.] 601; 3 Cooley's Briefs on Ins. [2d ed.] 2466; 38 Corp. Jur. 1089 [sec. 244]).

In the Court below petitioner sought to apply the principle enunciated by the foregoing cases to the situation at bar for the purpose of avoiding the towage warranty. It would seem from the opinion below that this principle would have been accepted and applied to the instant situation to avoid the warranty had the Court found, in the circumstances at bar, that the "Duke" actually engaged in an attempted salvage.

The Court below held, however, that the "Duke" had not engaged in an attempted salvage, reasoning that she was under a duty to make all reasonable effort to save her tow, and that such continuing duty prevented her from being treated as an attempting salvor. In reaching this result, the Court overlooked not only the statutory obligation imposed upon the "Duke's" master, but, also, the fact that if, as the Court held, and as the evidence indicated, the tug was too small and inadequate for the rescue job she tried to do, she necessarily exceeded any contractual obligation owing to her tow when she attempted to save the three barges and their crews, and, hence, actually was rendering a salvage service which was sufficient to avoid the towage warranty under the authorities hereinbefore adverted to.

Granted that the "Duke" was required to go to the

assistance of the barges, and that she could not abandon them without making all reasonable effort to save them, it does not follow, under the facts of this case, that such duty necessarily ran to the extent of requiring the "Duke" to attach a hawser on the barges and attempt to tow them away. The tug's duty, in all good reason, could not exceed her fair capacity of performance. As we will hereafter show, what the tug actually undertook to do, under the conditions then prevailing, was more than a reasonable effort, and, considering her concededly limited qualifications for the task, was outside and beyond any fair obligation that she owed her tow.

Generally, it is well established that the rendition of an extraordinary service by a towing tug, one not within the scope or contemplation of the original engagement, entitles the tower to be treated as a salvor (*The City of Portland*, 298 Fed. 27, 30 [C. C. A. 5]; *The Connemara*, 108 U. S. 352, 358, 27 L. Ed. 751; *The City of Haverhill*, 66 Fed. 159, 160; 56 Corp. Jur. 16 [sec. 15]).

In its prior decision, the *Jos. F. Clinton*, 250 Fed. 977, 979, the Court below recognized that a towage may develop into a salvage, where the service rendered by the tower is outside the contemplation of the parties.

In *The City of Portland, supra*, the Fifth Circuit, in referring to the rule prevailing in this country and in England, stated the rule, at page 30, as follows:

> "Yet here, as well as there, a towage service may be converted into a salvage."

In *The Connemara, supra*, page 358, this Court cited with approval the decision in an English case, *The Minnehaha*, 15 Moore (P. C.) 133, where it was said:

> "But if, in the discharge of this task, by sudden violence of wind or waves, or other accidents, the

> ship in tow is placed in danger, and the towing vessel incurs risks and performs duties which were not within the scope of her original engagement, she is entitled to additional remuneration for additional services if the ship be saved, and may claim as salvor, instead of being restricted to the sum stipulated to be paid for mere towage."

In the instant case the towage service clearly developed into an attempted salvage when the "Duke" placed her hawser on the first of the three barges and attempted to tow them and their crews to safety. The obligation owing by a tug to assist its tow requires only a *reasonable* effort by the former, as was stated in the *Clinton* case, *supra*. What will constitute a reasonable effort will vary in each case, and, necessarily, must depend upon the power and suitability of the towing tug to meet, and cope with, the requirements of the exigency with which she finds herself confronted.

This is particularly true where, as in the instant case, the tug is only one of three engaged in, what the Court below termed, a common venture, and where each of the tugs is of a different size and horsepower. In such circumstances the same measure of assistance cannot fairly be expected of each tug. The extent of the reasonable effort required of each tug in such a situation necessarily must vary with, and depend upon, the size and power of the respective tugs.

A small tug of limited horsepower, like the "Duke", could not fairly be subjected to the duty of towing, in a raging gale, a number of sizeable barges. Obviously, such an onerous obligation could properly be expected only of a larger tug, with more adequate motive and pulling power, such as the "Henjes". If the smaller tug, under such conditions, and in response to the statutory mandate to save life in distress, ventures alone to tow

the barges and their crews to safety, it is evident, we believe, that the operation, at that point, has been converted into a salvage service.

By refusing to adopt this view the Court below in effect, made the "Duke" an insurer of the safety of her tow. It is well settled, however, that a tug is not liable as a common carrier or as an insurer for damage to its tow, but is required to use only ordinary care and prudence (*Stevens* v. *The White City*, 285 U. S. 195, 202; *Simkins* v. *R. L. Morrison & Sons*, 107 F. [2d] 121, 122 [C. C. A. 5]). The obligation resting on the "Duke", in the circumstances at bar, did not require her to go as far as she did in her rescue effort.

In considering the extent to which the towing tug is obliged to go in order to satisfy her duty to her tow, it must be remembered that she is only bound to employ those means consistent with her safety (*The Mosher*, Fed. Cas. No. 9874; *The W. J. Keyser*, 56 Fed. 731, 734 [C. C. A. 5]), and that she is required to apply only such means as lie within her power (*The Robert L. Stevens*, Fed. Cas. No. 8). In accordance with these limitations it would be unreasonable, manifestly, to extend the tug's duty to a point beyond her capacity of performance.

In the instant case, referring to the attempted rescue, the Court below held that the "Duke" was too small for the job she tried to do. Indeed, so respondents contended in their brief below. Thus, it was said there in respect of the "Duke's" attempt to effect the rescue that it was "* * * a job for which her feeble 200 horsepower was totally inadequate". Similar admissions were made throughout respondent's brief in the Court below.

If the "Duke", so far as her normal duty was concerned, was too small for the job, and her motive power

totally inadequate for the task, it would be an anomaly to hold that her duty to her tow required her to throw a hawser on the three barges and tow them out of danger in the teeth of a furious gale. Considering the prevailing weather conditions, the size and number of the barges in distress and her own physical limitations, it is submitted that the tug's duty did not extend so far, and that when the "Duke" undertook that task she was clearly going beyond what her tow could reasonably expect of her, and that she then was, as a matter of law, rendering a salvage service.

Moreover, in this connection, it must be borne in mind that the "Duke", by statutory mandate, was obliged to attempt to rescue the crews on the barges, apart from any obligation she owed the barges themselves. This circumstance, alone, which is not mentioned in the opinion below, was sufficient, we submit, to convert the rescue attempt into a salvage service.

At the very least, upon the record, there was presented a fair question of fact for the jury whether the "Duke's" duty to her tow required her to go to the extent that she did in attempting the rescue. Surely reasonable minds could find, with justification, that, in the light of the existing conditions, her own physical limitations and the nature of the task confronting her, the "Duke's" duty to her tow required no more than that she await the arrival of the five hundred horsepower "Gerd Henjes" to undertake the job of towing the barges,* and in the interim do no more than stand by and render all assistance short of putting on a hawser and attempting to tow away the barges.

Something of this sort seems indicated by the remark in the opinion below that "the evidence is so clear that she had

* The "Henjes" had actually started to go to the assistance of the barges, but finally abandoned the attempt (R., pp. 65, 66).

done all she safely could for her tow, *and perhaps even more,* * * *". A jury might reasonably find upon all the evidence that in undertaking the difficult and hazardous task of attempting to tow the barges the "Duke" had in fact done more than her duty, and thus was rendering a salvage service.*

Whether the "Duke's" efforts reached a point where it might be claimed that her master had acted unreasonably, thereby forfeiting petitioner's right to maintain that the attempted salvage avoided the warranty, assuming any such principle possesses merit and is here applicable, also, would, at best, present an issue of fact. Reasonable minds might fairly find that the tug's activities, although exceeding her duty to her tow, had not reached an unreasonable extreme, and were necessitated by the statutory obligation to save life in distress, that being the avowed object of her efforts. Furthermore, even though the tug's master were found negligent, petitioner's right to a recovery would remain unaffected because the policy specifically insures against negligence of master and mariners.

In attempting in the circumstances at bar to save the barges and their crews the "Duke", by reason of her limited motive power, capacity and size, was rendering an extraordinary service, one plainly beyond any normal, or fair, obligation owing to her tow, and one which indisputably involved the rendition of more than a reasonable effort for the preservation of the tow, or at least so a jury might fairly find. The operation, therefore, properly constituted a salvage, and, as such, was sufficient to avoid the towage warranty and permit a recovery notwithstanding the prior breach.

In reaching a contrary conclusion the Court below has

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* It is noteworthy that the Trial Court was of the opinion that the rescue attempt constituted a salvage (R., p. 72).

attained a result inconsistent with the facts as found by it, and in conflict with the applicable decisions. The decision below creates a standard of duty which is grossly unfair to towing vessels and greatly at variance with the accepted standard heretofore applying to such vessels. There has been here prejudicial error of the most serious kind under such circumstances as should prompt this Court to exercise its discretion in granting certiorari.

POINT II.

The Court of Appeals erred in holding that there was no fair question of fact to be decided by the jury as to the actual cause of the loss. In so holding the Court improperly deprived petitioner of his right to a jury trial upon a vital and decisive issue in the case.

The Court below held that in order to be entitled to a recovery the petitioner was required to prove that the sinking, which concededly occurred after the policy reattached, was not caused by injuries the vessel received while the insurance was suspended. Upon the facts before it the Court was of the opinion, however, that the evidence conclusively established that the sinking was occasioned by injuries sustained while the insurance was suspended, viz., in the course of the attempted rescue.

In so holding the Court relied on the circumstances that during this period the vessel became involved in a severe storm, was pulled into shallow water, pounded on the bottom for some minutes, and finally cut away from her tow in the interests of her own safety. None of these circumstances, singly or in combination, compel the conclusion that they were the actual cause of the loss.

This is especially so if they be considered in conjunction with, and in the light of, the events which subsequently occurred while the tug was running light. Considering the evidence as a whole, there is room for reasonable minds to differ as to the cause of the loss, and in such circumstances the direction of a verdict was not warranted (*Sioux etc. R. R. Co.* v. *Stout*, 84 U. S. 657, 663-664; *Parsons* v. *Trowbridge*, 226 Fed. 15, 18 [C. C. A. 8]; *Delk* v. *R. R. Co.*, 220 U. S. 580, 587-588).

It would appear that the principal circumstance which influenced the Court's conclusion is the so-called pounding of the tug on the bottom, which, the opinion states, lasted for about twenty minutes. We submit that the evidence does not show conclusively that the vessel pounded on the bottom for any such length of time. The only reference to the duration of this occurrence is found in Captain Dowd's statement (Pltff.'s Exh. 5-e; R., p. 80).

There the master states that after attaching a hawser on the "Burr", one of the barges, the "Duke" immediately headed off shore, paying out the hawser for about 500 feet. She then endeavored to pull out the barges into deep water, but without avail. The statement continues that the sea was so high that on the rise and fall of each wave the "Duke" would strike bottom with considerable force. In the following paragraph, the affiant states: "This lasted for about 20 minutes and instead of making headway, we were constantly drifting with the barges onto the shore."

The word, "this", does not refer to the duration of the pounding, but rather to the length of time occupied by the entire operation, or at least so it might fairly be inferred. In this connection it is noteworthy that Dowd testified that the tug had its hawser on the barges for about twenty minutes to a half hour (R., pp. 45, 57), and that the second time the vessel touched bottom he ordered

the hawser chopped (R., p. 24). At the very least there is a fair question of fact whether it was the pounding or the entire rescue attempt that lasted twenty minutes.

If the facts be viewed in the light most favorable to petitioner, as they should be on appeal (*Lumbra* v. *United States*, 290 U. S. 551, 553; *Worthington* v. *Elmer*, 207 Fed. 306, 308 [C. C. A. 6]; *Osipoff* v. *City of New York*, 286 N. Y. 422, 425), any uncertainty or conflict in the evidence is required to be resolved in his favor. A jury, therefore, might reasonably find that the tug touched bottom only two or three times, and then for a period considerably less than twenty minutes, without sustaining any damage, especially since there is no evidence that the hull was stove in or that she was taking water from the bottom.

Apart from the pounding incident there is nothing of such a conclusive nature in the evidence as to compel the conclusion that the tug was damaged or rendered unseaworthy during the rescue attempt. Her involvement in the storm, and the drifting into shallow water, were risks which she may have successfully survived without harm, or, at least, so a jury might fairly find.

In passing, it may be noted that the so-called shallow water was about twenty to twenty-five feet deep (R., p. 45), a circumstance which tends to negative any suggestion that the contact was of a very forcible nature. Indeed, Captain Dowd denied that the tug struck bottom with much force (R., pp. 46, 52). Any contradiction between Dowd's testimony and his subsequent written statements affects merely the weight and credibility of his testimony, and does not compel acceptance of the statements as conclusive, or the direction of a verdict for respondents (*Robinson* v. *Van Hooser*, 196 Fed. 620, 626 [C. C. A. 6]).

The word, "pound" (R., p. 87) appears to have been adopted by Dowd without understanding of its significance. The statement was made by the master shortly after his harrowing experience, and, at a time when, apparently, he was not in a fit condition to draw any distinction between merely striking and pounding, as his testimony indicates (R., p. 52).

If, as petitioner maintains, a jury might reasonably find that the vessel touched bottom only momentarily, it is evident that the basis for giving a conclusive effect to this episode must fall because a jury might then fairly find further that the so-called pounding, as well as the other circumstances mentioned by the Court below, were entirely insufficient to cause the loss.

Going a step further, a jury considering the events which transpired subsequent to the rescue attempt, could reasonably find that the perils then encountered were the actual cause of the loss. In this connection the undisputed evidence was that the tug was not sinking when she cut away from the barges and that the water which was coming in over her deck was being pumped out (R., p. 58). The water previously shipped was probably held by the tug's pumps, as respondents admitted in their brief below.

After cutting away from the barges at about 8:40 P. M. (R., pp. 25, 57), the tug appears to have navigated her course without difficulty (R., pp. 53, 58-59) for about three-quarters of an hour, until about 9:30 P. M., when she sent out distress signals. During this period, it is significant, the severity of the storm intensified considerably (R., p. 57).

Evidently, it was during this period, while the "Duke" was running light, that the seas became rougher and struck the vessel with overwhelming force. The waters then came in with such rapidity and force that the tug

was unable to rid herself of them as quickly as they swept over her, with the result that she was severely battered and gradually swamped, ultimately succumbing to the fury of the elements.

A graphic picture of the conditions encountered by the "Duke" after she had cut loose from the barges, and of their effect upon her, was given by the "Duke's" master, who testified, as follows:

> "Q. Now, under what engine speed did you then proceed towards Coney Island? A. Very slow. We couldn't go fast because we would dive into the big seas.
>
> Q. Was your tug affected in any way by these seas to your knowledge? A. Yes. *The tug was being buried in these seas, and the windows were being broken in the pilot house and the seas were coming right there, knocked me down a couple of times.*
>
> Q. Were you at the wheel? A. At the wheel.
>
> Q. Was this on the way back? A. On the way back.
>
> Q. And at about what time would you say it was when you started for New York and were on your own? A. About 8:40, 8:45.
>
> Q. At night? A. At night.
>
> Q. And weather conditions at that time, had they moderated at all? A. Not one bit.
>
> Q. Will you tell us what action there was on the part of your boat and the seas as you were going towards New York; describe first how she was acting. A. *She was diving with every wave, and before we could come up again after being covered over with the wave another sea would hit us and another one and another one. It wouldn't give us a chance to throw off the water that we were being covered up with.*

* * *

Q. And did the scuppers and freeing ports take care of the seas which were coming aboard of her? A. No. They kept—they were coming too fast and too heavy" (R., pp. 24-25). (Italics ours.)

The witness' testimony on re-cross examination demonstrates convincingly that the vessel had not suffered any injuries while the insurance was suspended which brought about her subsequent sinking, or at least upon the entire case so a jury might fairly find. Thus, he testified:

"Q. Now, your whole trouble started in the breakers just before you cut your hawser; isn't that so? A. No, sir.

Q. When did your trouble start? A. Our troubles started when we were off Jones Inlet and the seas were heavier and we couldn't stand it any more.

Q. That was before you cut your hawsers, wasn't it? A. No. While we were running light to New York we had let go of the three scows we got in real danger" (R., pp. 58-59).

From the foregoing brief review of the evidence it is evident that a jury could reasonably find that the increased severity of the storm was too much for the small tug and that her exposure to the overpowering elements after she had cut loose from the barges, and after the insurance had reattached, were the actual cause of her sinking. Giving this evidence due weight it would seem plain that it was sufficient to establish that the loss occurred from perils encountered after the insurance had reattached, thereby overcoming any contrary inference arising from the evidence relating to the occurrences during the attempted rescue. At least, it would seem that on the whole case a fair question of fact was presented requiring submission of the issue to the jury.

The situation at bar does not differ in principle from that presented in cases were a vessel shortly after sailing becomes leaky and suddenly sinks. In those cases it has been held that the circumstances mentioned are merely presumptive evidence of unseaworthiness, and that the presumption is not conclusive but may be rebutted by showing that the loss was occasioned by some cause other than unseaworthiness (*Petrie* v. *P. Ins. Co.*, 132 N. Y. 137, 144; *Singleton* v. *P. Ins. Co.*, 132 N. Y. 298, 303-304; *McLain* v. *Brit. and For. Mar. Ins. Co.*, 16 Misc. 336, 337).

Generally, it is well settled, any material evidence pointing to one of the perils insured against as a probable cause of the loss will suffice to raise a question of fact whether the loss was occasioned by such peril or by unseaworthiness, even though there be strong indications that the loss might have been caused by the latter condition (*Massey S. S. Co.* v. *Importers' and Exporters' Ins. Co.*, 153 Minn. 88; *Green* v. *Globe and Rutgers Fire Ins. Co.*, 200 App. Div. 343; *Hellman Transp. Co.* v. *Home Ins. Co.*, 268 Pa. 547; *Swift* v. *Union Mutual M. Ins. Co.*, 122 Mass. 573; *Fireman's Fund Ins. Co.* v. *Globe Nav. Co.*, 236 Fed. 618, 623 [C. C. A. 9]; *American Mcht. Marine Ins. Co.* v. *Liberty S. & G. Co.*, 282 Fed. 514, 518 [C. C. A. 3]; cert. denied 260 U. S. 737).

In *Massey S. S. Co.* v. *Importers' and Exporters' Ins. Co., supra,* the Court referred with approval, in the following language appropriate to the situation at bar, to the holding in the case of *Anderson* v. *Morice*, L. R. 10 C. P. 58:

> "It was the opinion of the court that there would be an irresistible inference of unseaworthiness if a ship sank in smooth water without any apparent cause and there was no other evidence as to her con-

> dition; *but when there was other evidence of the nature already mentioned* [*i. e.*, proof of loss from a peril covered by the policy], *the fact of the ship's sinking became one of several facts, which must all be left to the jury, and, if they concluded on the whole evidence that the ship was seaworthy, they might find that she was lost by a peril of the sea, though unable to ascertain or safely conjecture what such peril was.*" (Italics ours.)

Granting, *arguendo*, that petitioner had the burden of proving that the sinking was not caused by injuries the vessel received while the insurance was suspended, it is submitted that any reasonable explanation of the loss which indicated that the sinking was caused by a peril insured against, would fully meet that burden, and create an issue of fact for the jury (cf. *Long Dock Mills and Elevator Co.* v. *Mannheim Ins. Co.*, 116 Fed. 886, 888; aff'd 123 Fed. 861). In the instant case there was ample evidence that the sinking was actually caused by the increased severity of the storm after the "Duke" had cast off from the barges and after the insurance had reattached.

There is no occasion, we submit, for giving conclusive and irrebuttable effect to any inference that the "Duke's" loss was caused by her efforts during the attempted rescue. Any inference arising from those circumstances is not entitled to more weight than the presumption of unseaworthiness arising from a sudden sinking, which, as we have seen, is subject to rebuttal by proof that the sinking might have been occasioned by some other cause.

The mere fact that the Court might have felt that the proof preponderated in favor of respondents' theory did not justify taking the case from the jury (*M'Intyre* v. *Modern Woodmen of America*, 200 Fed. 1, 8 [C. C. A. 1]).

The weight of the evidence is for the jury (*Crumpton* v. *United States,* 138 U. S. 361, 363), and a court should not substitute its viewpoint for theirs (*Sioux etc. R. R. Co.* v. *Stout,* 84 U. S. 657, 663). Where, as here, there is some material evidence on a question of fact, the jury should be permitted to pass on it, whether the evidence be strong or weak (*Hickman* v. *Jones,* 76 U. S. 197, 201).

In the case at bar there was little evidence elicited concerning the boat's condition when she cut away from the barges. The members of her crew, with the exception of the master, did not testify. On the trial this phase of the case appears to have been subordinated by all concerned to the question whether in assisting in the tow of more than one vessel the "Duke" had breached the towage warranty; that, indeed, being the principal basis for respondents' motions for a directed verdict (R., pp. 69, 71), and the ground upon which the Trial Court decided the case (R., pp. 73-74). Considered in the light of all the circumstances it would seem clear that petitioner was entitled to have the issue as to the cause of the sinking submitted to the jury.

It is submitted, with all due deference, that in holding otherwise the Court below substituted its judgment for that of the jury on an issue properly determinable by the latter. By its approach to the problem and the result reached the Court below has deprived petitioner of his right to a jury trial upon a vital and decisive issue in the case. The interests of substantial justice require, we submit, that the determination below be reviewed by this Court.

CONCLUSION.

For the reasons stated in the petition and in this brief, it is respectfully submitted that the application for a writ of certiorari should be granted.

Respectfully submitted,

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Of Counsel.

MAY 17 194

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 947.

GERD H. HERMES,

Petitioner,

—against—

AETNA INSURANCE COMPANY, ATLANTIC MUTUAL INSURANCE COMPANY, BRITISH & FOREIGN MARINE INSURANCE COMPANY, LIMITED, COMMERCIAL UNION ASSURANCE COMPANY LIMITED OF LONDON, ENGLAND, FEDERAL INSURANCE COMPANY, HARTFORD FIRE INSURANCE COMPANY, INSURANCE COMPANY OF NORTH AMERICA, NORTH BRITISH & MERCANTILE INSURANCE COMPANY, LIMITED, ROYAL INSURANCE COMPANY, LIMITED, STANDARD MARINE INSURANCE COMPANY, LIMITED, THE AUTOMOBILE INSURANCE COMPANY OF HARTFORD, CONN., THE CONNECTICUT FIRE INSURANCE COMPANY, THE CONTINENTAL INSURANCE COMPANY, THE HOME INSURANCE COMPANY, UNIVERSAL INSURANCE COMPANY and WESTCHESTER FIRE INSURANCE COMPANY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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JOHN M. AHERNE,
On the Brief.

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Supreme Court of the United States

OCTOBER TERM, 1942.

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GERD H. HENJES,

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AETNA INSURANCE COMPANY, ATLANTIC MUTUAL INSURANCE COMPANY, BRITISH & FOREIGN MARINE INSURANCE COMPANY, LIMITED, COMMERCIAL UNION ASSURANCE COMPANY LIMITED OF LONDON, ENGLAND, FEDERAL INSURANCE COMPANY, HARTFORD FIRE INSURANCE COMPANY, INSURANCE COMPANY OF NORTH AMERICA, NORTH BRITISH & MERCANTILE INSURANCE COMPANY, LIMITED, ROYAL INSURANCE COMPANY, LIMITED, STANDARD MARINE INSURANCE COMPANY, LIMITED, THE AUTOMOBILE INSURANCE COMPANY OF HARTFORD, CONN., THE CONNECTICUT FIRE INSURANCE COMPANY, THE CONTINENTAL INSURANCE COMPANY, THE HOME INSURANCE COMPANY, UNIVERSAL INSURANCE COMPANY and WESTCHESTER FIRE INSURANCE COMPANY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

Statement.

The opinion of the Circuit Court of Appeals for the Second Circuit, which this Court is asked to review is reported in 132 Fed. (2d) 715, and appears at pages 99-107 of the record. The opinion of the District Court, though not officially reported, is found in 1942 A. M. C. 233.

Petitioner admits he was guilty of a continuing breach of warranty in a policy of marine insurance covering the hull and tower's liability of his tug "Edwin Duke". Both courts below found on undisputed facts (respondent rested on petitioner's case) that the vessel's loss resulted from damage received while the warranty was being violated. The decision of the Second Circuit Court of Appeals is not in conflict with that of any other circuit. It presents none of the elements which form essential basis of certiorari.

Facts.

While the facts are fully stated in the opinion of the Circuit Court of Appeals, some brief review is desirable because of certain statements, significant omissions and implications in the petition and brief, which the record does not support.

In the policy endorsement covering the tug "Edwin Duke" (hereinafter called "Duke") petitioner warranted that in navigation to Great South Bay (Long Island, New York) by the outside route, *i. e.,* via Fire Island Inlet, this vessel would have "not in excess of one vessel in tow". On December 3, 1940 the "Duke" went to Fire Island Inlet as a part of a tow which consisted of herself and two other tugs (the "Gerd H. Henjes" and "Helen Barbara") all towing four barges loaded with rock (R., pp. 33-35). This was a breach of the towage warranty as both Courts found (R., pp. 72, 103) and as the petition now admits. Upon arriving at Fire Island Inlet on December 4th a new tow was made up for the return or westbound trip (R., pp. 16-17). The new tow consisted of the same three tugs in tandem formation, the "Duke"

leading, and four light barges, also in tandem, following the third tug (R., pp. 38-39, 79). This formation also constituted a breach of the towage warranty as both courts found (R., pp. 73, 103) and as the petition now admits. The effect of this continuing breach was to terminate or suspend the policy coverage. This also petitioner admits.

The reason for the warranty "not in excess of one vessel in tow" is readily apparent from the fact that the "Duke" was a small tug, 69 feet in over-all length (R., p. 14) and having only 200 horsepower (R., pp. 17, 84). The larger tug, "Gerd H. Henjes" (500 horsepower, R., p. 61), was insured under the same policy, but because of her size and horsepower there was no similar warranty. The United States Coast & Geodetic Survey chart No. 1215 (Plaintiff's Exhibit 8, R., p. 83, Stipulation, p. 94) shows that the outside route from East Rockaway Point to Fire Island Inlet is in the unsheltered waters of the open Atlantic where a vessel is exposed to the full rigors of storms from the east, south and west, as the events which led to the loss of the "Duke" readily illustrate. It was to avoid just such dangers that the towage warranty on the "Duke" was designed. A tug owes a very clear duty to the vessels in her tow. She cannot abandon them when danger threatens. When danger is greatest her duty is highest—"a tug is bound by the contract of towage not to abandon both tow and contract when the former gets into trouble * * * when danger arises, the tow cannot be abandoned until all reasonable efforts for its preservation have been exhausted" (*The Joseph F. Clinton,* 250 Fed. 977, 979, C. C. A. 2). It was this clear duty that made it important for underwriters to stipulate that

this small vessel, the "Duke", would have not in excess of one vessel in tow when working in the unsheltered waters referred to above.

While the "Duke" was towing, in admitted breach of this warranty, and proceeding eastward on the return from Fire Island Inlet she ran into trouble. A southwest storm (R., pp. 19, 85) arose, and by 5:30 P. M. the wind was 30 to 40 miles per hour (R., pp. 19, 79), and by 6:30 P. M. the wind increased in violence and the waves were 25 feet high (R., p. 20). Between 6:30 and 8:30 P. M., in the midst of the storm, the hawsers from the "Gerd H. Henjes" to the barges parted on three separate occasions (R., pp. 20-21, 79-80, 86-87), and on each occasion the "Duke", as the leading tug, was *ordered* (by radio telephone) by the master of the "Gerd H. Henjes" to get out of formation and go back to assist them. In going back the "Duke" was not acting as a voluntary salvor (as the petition states) but she was acting under orders and pursuant to her duty to her tow. The third occasion was at 8:15 P. M., three barges had broken loose (R., p. 21); "they were flying like a kite" (R., pp. 43-44) before the wind towards the Long Island shore (R., 130), and the "Duke" was chasing them (R., p. 44). When the "Duke" got a line on the barges her doom was sealed. It was then "blowing a gale" from the southwest (R. 21). She had her hawser on them for 20 or 30 minutes (R., p. 45) and she was making leeway so fast that she was "pounding on the outer bar in the midst of the breakers shipping water heavily in solid sheets. With the rise and fall of the breakers I could feel my tug pound on the bar with considerable force" (R., p. 87). These were her master's words two days after the accident, and on trial he admitted their truth (R.,

pp. 47-48). His "protest" is the same (R., pp. 79-81). This pounding lasted for twenty minutes (R., pp. 48, 80). The petition (p. 4) says the "Duke" merely "touched" or "smelled" bottom, but her master admitted she "struck bottom with considerable force" (R., pp. 47, 141); that she "pounded" (R., p. 87). As a result she started to make considerable water (R., p. 80), so she cut her hawser (R., pp. 24, 80, 87) and her captain decided he "had better try to make Coney Island" (R., p. 24). He therefore "tried to head for New York, running light" (R., p. 87).

Very shortly thereafter, about 9:00 P. M., the water was up to the flywheel (R., p. 87). At 9:30 P. M. she sent out an S. O. S. (R., pp. 25-26) to a Coast Guard cutter (R., p. 81)*, and immediately determined to abandon the ship, because her stern was completely under (R., p. 26). The ship was abandoned (R., p. 27) and sank a short time thereafter.

The Opinion of the Circuit Court of Appeals.

The Circuit Court of Appeals held that the formation of the eastbound and westbound tows was a clear violation of the towage warranty (R., p. 103) citing *Shipowners' & Merchants Tugboat Co.* v. *Hammond Lumber Co.*, 218 Fed. 161; *The Bordentown*, 40 Fed. 682; and *The Geo. W. Pratt*, 76 Fed. (2d) 902, and observed that if the vessel had been lost while in such formations non-coverage would have been clear. Fol-

* This gives petitioner the most favorable inferences possible. Her master swore (Protest, R., p. 79) that she was in danger of sinking for half an hour before she sighted the coast guard cutter. In point of time therefore the blow which caused her to leak is, unerringly, put back to the pounding on the bar, when she started "to make considerable water, being free of water prior to the time we put our hawser on the three barges" (R., p. 80).

lowing *Smith* v. *Northwestern F. & M. Ins. Co.*, 246 N. Y. 349, the Court held that the breach of the warranty merely suspended the policy (R., p. 105), and the policy would reattach after the breach terminated, provided petitioner proved that the sinking, which immediately followed the termination of the breach, was not caused by injuries received while the vessel was operating in breach of the warranty (R., p. 107). The Court said an assured cannot breach the towage warranty at will and then, when the vessel gets into trouble, restore the coverage by the simple expedient of cutting the hawser.

Citing the *Joseph F. Clinton*, 250 Fed. 977, the Court held that the "Duke's" legal and contractual obligations to her tow required her to go to the assistance of the barges; that this continuing obligation prevented her from being regarded as a voluntary salvor, and that her duties in this respect were not discharged until consideration for her own safety required her to cut her hawser and abandon her tow (R., pp. 103-104). The evidence that her mortal wounds were received while she was attempting to discharge her legal duty to the tow, the Court said, was too clear to leave any fair question of fact to be decided by the jury. It pointed too certainly to the actual cause of the loss to leave any fair issue of fact (R., p. 107).

FIRST POINT.

The situation which caused the loss of the "Duke" was created by, and was the natural and inevitable result of, the breach of the towage warranty. The "salvage" argument is invoked to avoid the effect of the admitted breach. In going to the assistance of the barges the "Duke" was acting (1) under orders; and (2) pursuant to her legal and contractual duty to the tow.

The sea perils which caused the loss of the "Duke" commenced to operate at 4:30 P. M., when the gale began to generate, and while she was towing in breach of the warranty. What followed from that time on was but a natural development of the situation created by placing her in that formation. Because she was small and had but 200 H. P., the warranty forbade towage of more than one vessel. It was to avoid just such a situation as she found herself in, that the warranty was designed. The obligations of a tug to its tow are set forth in the *Jos. F. Clinton*, 250 Fed. 977, 979, and because of her size the "Duke" could not, when trouble arose, safely discharge such obligations to more than one vessel.

However, deliberately, wilfully and intentionally she violated the warranty and petitioner now argues that when she was discharging her legal duties to the tow she was not towing, but was engaged in voluntary salvage. This is pure sophistry. First, it is directly contradicted by the facts—the "Duke's" master testified he was acting under orders of Captain Welle, the master of the "Gerd H. Henjes" (R., pp. 16-18) and the latter testified he was in

charge of the whole flotilla (R., p. 63). The "Duke" did *not* voluntarily go to the assistance of the tow—she was *ordered* to do so by Captain Wells (R., pp. 20-21). It is therefore a fact, beyond dispute on this record, that the "Duke" was not rendering voluntary salvage assistance pursuant to 46 U. S. C. A. 728, as petitioner contends, but was following the orders of the person in charge of the tow, who was bound by law and contract, when danger threatened, to exhaust all reasonable means before abandoning his tow.

Thus, whether the "Duke" was 200 or 500 horsepower, her duty was the same. Petitioner knew her size and horsepower when he breached the warranty, and he is now forced to argue the absurd proposition that because she was 200 horsepower, and thus unable to handle three barges in that storm, there was no breach, although he admits by necessary implication that if she were 500 horsepower there would have been a breach. By such specious argument does petitioner strive to avoid the effect of the admitted breach.

Secondly, petitioner's position is flatly opposed to the settled rule of law exemplified by *The Joseph F. Clinton,* 250 Fed. 977, 979. In towing four barges the "Duke" took upon herself with respect to each barge, the legal and contractual duties of a towing vessel, all in violation of the warranty expressly designed to avoid them. This is not a salvage case. We are not here concerned with the precise instant of time in a storm-at-sea situation when a tug's role may change from a towing to a salvaging vessel so as to entitle her to collect for salvage services. We are concerned here with a question of marine insur-

ance coverage, viz., whether the admitted pounding and leaking of a vessel, which occurred while she was operating in breach of a warranty, was the cause of the sinking which almost immediately followed. We readily agree that under certain conditions a towing vessel may render salvage services to her tow, and collect for them (*City of Portland,* 298 Fed. 27; *The Connemara,* 108 U. S. 352; *The City of Haverhill,* 66 Fed. 159), but we say, as the Circuit Court of Appeals said, that this is a suit on an insurance policy—not a suit for salvage—and those cases do not touch the question. They certainly do not give petitioner immunity from the consequences of an established breach of warranty in an action on a policy of insurance.

SECOND POINT.

The Circuit Court of Appeals and the District Court were right in holding there was no fair question of fact to be submitted to the jury.

Respondent rested at the close of petitioner's case. Respondent's whole case (R., p. 270) consisted of one document, the master's protest (R., pp. 79-82), which was already in evidence as part of petitioner's case (Plaintiff's Exhibit 5-e). The facts developed on petitioner's case were therefore admitted. Petitioner's own evidence proved all the facts upon which the District Court and the Circuit Court of Appeals relied in directing a verdict for the respondent. The master's sworn protest, and his statement made two days after the accident (R., pp. 84-89), were introduced by petitioner, and their truth was affirmed by the master on the trial (R., pp. 47-53). This removed

any jury question on credibility. No inferences from this undisputed evidence, other than those drawn by the Court's below, can reasonably or logically be drawn. This is not a negligence case, where the degree of care required of a reasonable man frequently makes a jury issue where facts are otherwise undisputed (*Gunning* v. *Cooley,* 281 U. S. 90). This tug admittedly encountered a sea peril while the policy coverage was suspended by the breach of warranty. When the hawser parted her duty to her tow required her to assist them. While she was discharging that duty the sea peril admittedly caused her to pound on the bar for some twenty minutes. She started to take water instantly, so she cut her hawser and tried to escape. She was obviously then leaking dangerously and she sank shortly thereafter. Petitioner had the burden of showing the loss did not result from the injury admittedly sustained while the policy was suspended (R., p. 107); and these undisputed facts point too unerringly to the cause of her leaking, and ultimate sinking, to say that there was any evidence upon which a jury could properly find a verdict for petitioner.

McGuire v. *Blount,* 199 U. S. 142, 148;
Improvement Co. v. *Munson,* 14 Wall. 442, 448;
Pleasants v. *Fant,* 22 Wall. 116, 122.

There was, therefore, on these undisputed facts no fair question to be submitted to the jury.

THIRD POINT.

This case presents none of the grounds for the granting of a writ set forth in Rule 38.

Despite petitioner's general jurisdictional statement, the petition and brief fail to name a single decision of another circuit with which the decision below is in conflict. Nor is petitioner able to sustain its assertion that the decision is in conflict with prior decision of the Second Circuit in *The Joseph F. Clinton,* 250 Fed. 977, for the Court below expressly cited and followed that case (R., p. 104) and we urge it here. What petitioner really asks is that this Court grant a writ "merely to review the evidence or the inferences to be drawn from it". This, the Court will not do (*General Pictures Co.* v. *Electric Co.,* 304 U. S. 175, 178), especially on concurrent findings below (*U. S.* v. *Chemical Foundation,* 272 U. S. 1, 14).

No novel or important question is presented, nor is the decision below in conflict with applicable decisions of local or federal law. The Courts below followed the accepted and usual course of judicial proceedings and no situation calling for the exercise of the Court's power of supervision is presented by this record.

Layne & Co. v. *Western Well Works,* 261 U. S. 387, 393;
Hamilton-Brown Shoe Co. v. *Wolf Bros.,* 240 U. S. 251, 258;
Forsyth v. *Hammond,* 166 U. S. 506, 513-514.

CONCLUSION.

It is respectfully submitted that the petition for a writ of certiorari has no merit and should be dismissed.

Dated, May 14, 1943.

Respectfully submitted,

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